Jemaah Pengurusan Tadika v Pengarah Jabatan Pendidikan Negeri Johor & Ors

HIGH COURT (JOHOR BAHRU) — WRIT NO 25–15–04 OF 2015
ABDUL MAJID JC
25 JANUARY 2017

Civil Procedure — Judicial review — Application for — Applicant filed judicial review application to quash decision of first respondent issuing provisional certificate of registration of kindergarten ('Form F') dated 13 January 2015 to third respondent — Whether court should make any judicial pronouncement in respect of Form F which had expired

This was a judicial review application by the applicant seeking, inter alia, (a) a certiorari to quash the decision of the first respondent in issuing provisional certificate of registration of kindergarten school ('Form F') dated 13 January 2015 to register 'Tadika Qiao Qing' and to operate on GRN 89452, Lot 25, Bandar Padang Endau, Mersing, Johor; (b) to declare that no proper and valid Form F dated 13 January 2015 had been issued to the third respondent to operate a kindergarten; and (c) to declare that the said Form F was not in compliance with the 'Panduan Mengisi Butiran Kertas Kerja Penubuhan Institusi Pendidikan Swasta' and/or other relevant guidelines or law was wrongful, null and void. The issue for court's determination was whether the court should make any judicial pronouncement in respect of the impugned Form F which had expired.

Held, dismissing the application with no order as to costs:

(1) By the time the present application came before the court the said Form F was a dead letter as it had no force of law any longer. Thus there was no living issue before the court to adjudicate upon (see para 13).

[Bahasa Malaysia summary

Ini adalah permohonan semakan kehakiman oleh pemohon memohon, antara lain, (a) certiorari untuk membatalkan keputusan responden pertama dalam mengeluarkan sijil peruntukan pendaftaran sekolah tadika ('Borang F') bertarikh 13 Januari 2015 untuk mendaftar 'Tadika Qiao Qing' dan untuk beroperasi atas GRN 89452, Lot 25, Bandar Padang Endau, Mersing, Johor; (b) untuk mengisytiharkan bahawa tiada Borang F yang betul dan sah bertarikh 13 Januari 2015 telah dikeluarkan kepada responden ketiga untuk menjalankan tadika; dan (c) untuk mengisytiharkan bahawa Borang F tidak mematuhi dengan 'Panduan Mengisi Butiran Kertas Kerja Penubuhan Institusi Pendidikan Swasta' dan/atau garis panduan lain yang relevan atau

undang-undang adalah salah, batal dan tak sah. Isu untuk penentuan mahkamah adalah sama ada mahkamah patut membuat apa-apa pengumuman kehakiman berkaitan Borang F yang dipersoalkan yang telah tamat tempoh.

Diputuskan, menolak permohonan tanpa perintah terhadap kos:

(1) Pada masa permohonan ini dikemukakan di hadapan mahkamah Borang F tersebut adalah surat mati kerana ia tidak mempunyai kuasa undang-undang lagi. Oleh itu, tiada isu aktif di hadapan mahkamah untuk diputuskan (lihat perenggan 13).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

Cases referred to

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208, CA (refd)

Kurnia Outdoor Sdn Bhd v Majlis Bandaraya Petaling Jaya [2015] MLJU 437, HC (distd)

Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors [1988] 3 MLJ 82, SC (refd)

Legislation referred to

Education Act 1996 ss 81, 82

Education (Kindergarten and Nursery School) (Registration) Rules 1972 r 7, Forms D, F

David Mathews (Raja Seelan & Assoc) for the applicant.

Asliza bt Ali (Senior Federal Counsel, State Legal Advisor's Office) for the first and second respondents.

S Jeyakumar (Tea Kelvin Kang & Co) for the third respondent.

Abdul Majid JC:

INTRODUCTION

[1] The applicant files a judicial review, inter alia, seeking for:

(a) a certiorari to quash the decision of the first respondent in issuing a provisional certificate of registration of kindergarten/nursery school ('Form F') dated 13 January 2015 to register Tadika Qiao Qing and to operate on GRN 89452 Lot 25 Bandar Padang Endau, Mersing in the State of Johor;

(b) to declare that no proper and valid Form F dated 13 January 2015 has been issued to the third respondent to operate a kindergarten; and

(c) to declare that the said Form F is not in compliance with the 'Panduan Mengisi Butiran Kertas Kerja Penubuhan Institusi Pendidikan Swasta' and/or other relevant guidelines or law is wrongful, null and void.

BACKGROUND FACTS

[2] The applicant has been operating since 1976 as a kindergarten and feeder to Chiao Ching National Type (Chinese) Primary School. Both are operating on the same property namely GRN 89452 Lot 25, Bandar Padang Endau, Mersing in the State of Johor.

[3] One Form F dated 16 December 2014 was issued to the applicant carrying an expiry date on 31 December 2015 to enable the applicant to operate Chiao Ching Kindergarten for the year 2015. Form F is a provisional certificate for registration issued pursuant to r 7 of the Education (Kindergarten and Nursery School) (Registration) Rules 1972.

[4] Sometime in 2014 there was discord between the applicant and the committee of Chiao Ching National Type (Chinese) Primary School which resulted in the establishment of the third respondent (Tadika Qiao Qing) and the commencement of enrolment of children into the same where the third respondent was also issued with a similar Form F dated 13 January 2015 having the same expiry date as the applicant to operate on the same property for the year 2015. Hence, there are two separate kindergartens operating at the same time.

THE MAIN SUIT

[5] The applicant being confronted with this situation filed a Writ No 22NCVC-189–11 of 2014 seeking a declaration as a beneficiary of the said property under a constructive trust and to injunct the defendants (the board of governors of Chiao Ching National Type (Chinese) Primary School & Ors) from:

(a) removing the applicant from the property;

(b) demolishing the premises where the applicant was operating; and

(c) obstructing and interfering with the management of Chiao Ching Kindergarten.

[6] A consent order dated 4 December 2014 was entered which in essence allowing the applicant to continue its operation until the disposal of the suit.

THE APPLICATION

[7] The issue before me is the propriety of the decision of the assistant registrar of Institute of Teacher Education in issuing Form F dated 13 January 2015 to the third respondent which carries an expiry date on 31 December 2015. By the time this application came before me on 26 September 2016 the impugned Form F had already expired. Learned counsel for the third respondent in the course of his submission in reply to the applicant drew the court's attention to the first prayer and referred to exh AAR1 in the affidavit in reply affirmed by the assistant registrar of the Institute of Teacher Education ('encl 16'). Premised on this exhibit he argued that the matter was academic as the impugned Form F had lapsed.

[8] I posed a query to him whether it was lawful to issue Form F for it being a provisional certificate on yearly basis instead of Form D once the investigation is completed. Form F is issued pursuant to s 81 of the Education Act 1996 ('the Act') which reads:

> 81(1) Pending investigation on an application made under subsection 79(2), the Registrar General may, in his discretion, issue to the person who is to act as chairman of the board of governors or the person responsible for the management of an educational institution a provisional certificate of registration in such form and subject to such conditions as may be prescribed.
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> (2) A provisional certificate of registration issued under subsection (1) may at the discretion of the Registrar General be revoked at any time by notice in writing served on the person to whom the certificate was issued.

Form D on the other hand is issued pursuant to s 82 which reads,

> 82 (1) Without prejudice to section 81 and subject to subsection (3) and section 83, the Registrar General shall, upon an application for the registration of an educational institution duly made and after such inquiry as he may think necessary, and upon payment of such fee as may be prescribed, register the educational institution and issue to the chairman of the board of governors or to the person responsible for the management of the educational institution a certificate of registration.
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> (2) The chairman of the board of governors or any other person responsible for the management of an educational institution shall cause a copy of the certificate of registration issued under subsection (1) to be kept exhibited in a conspicuous part of the premises of the educational institution.
>
> (3) The Registrar General may impose such conditions precedent to registration as he deems fit.

This prompted learned counsel for the third respondent to make a request to look up for materials and to file further affidavits to which the applicant has no objection.

[9] The third respondent thereafter accordingly filed further affidavits. In the supplemental affidavit dated 5 October 2016 affirmed by one Wong Tse Pau who is the Chairman of the Board of Governors of Tadika Qiao Qing he exhibited a letter from the assistant registrar of the Institute of Teacher Education dated 27 September 2016 which stated that the department did not issue Form D to Tadika Qiao Qing or any nursery school in the State of Johore in accordance with the standard operating procedure issued by the Ministry of Education. Apart from this letter there was no other evidence to explain why Form D was not issued. I would have thought that being a provisional certificate issued while investigation is pending, Form F will be replaced by Form D once the investigation is completed and when no irregularity is found.

[10] When the hearing resumed on 20 November 2016 for decision the learned senior federal counsel appearing for the first and the second respondent informed the court that the first respondent has been advised to issue Form F to the applicant for the year 2016. The court was told earlier that the applicant has filed another similar application against the first and the second respondent for the refusal to grant Form F for the year 2016 which was still at the case management stage.

[11] Learned counsel for the applicant cited *Kurnia Outdoor Sdn Bhd v Majlis Bandaraya Petaling Jaya* [2015] MLJU 437 in support of his contention that I should proceed to decide on the validity of Form F. There it concerned two decisions by the local authority revoking the two permits which had been stayed (ordered by the court) pending the disposal of the application for judicial review. Therefore, to my mind, it is distinguishable as the permits were still valid at the time of the hearing as there was no revocation as yet.

[12] Be that as it may, notwithstanding the complaints advanced by the applicant, I think the issue here is whether I should make any judicial pronouncement in respect of the impugned Form F which has expired.

In *Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ 82 at p 84 the Supreme Court had this to say:

> It is also an established principle consistently followed by our courts that the issuing of a declaration is discretionary. The power to issue a declaration should be exercised with circumspection with a proper sense of responsibility and ought not to be exercised unless the circumstances justify it. See also the speech of Viscount Radcliffe in the Privy Council in *Ibeneweka v Egbuna* [1964] 1 WLR 219 and *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.
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> More importantly, before a court makes a declaration there must be persons or a body as the proper or lawful recipient of the benefits of the declaration. The court does not act in vain.

In *Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors* [2006] 3 MLJ 208 at p 211, the Court of Appeal held:

> The subject matter of the appeal was the correctness of the restrictive residence order made against the appellant and to which he had been subject. That order having come to an end, there was no longer a valid lis before us for adjudication. Any views we may express about the validity or otherwise of the order would be wholly academic in the circumstances of this case. It will simply have no effect at all. It will mean that we would act in vain. And it is settled law that a court will not act in vain. Equally it is also settled that the court will not grant academic declarations. See *Re Barnato* [1949] Ch 258. There is therefore no alternative but to dismiss this appeal.

[13] By the time this application came before me the said Form F is a dead letter as it has no force of law any longer. Thus, there is no living issue before me to adjudicate upon. However, in encl 32 it is deposed that the third respondent has been issued with a Form F dated 17 December 2015 which carries an expiry date on 31 December 2016 and that the application by the applicant is still pending. That is the Form F which is prevailing at the moment but it is not before this court. Since the issue is no longer alive in respect of Form F dated 13 January 2015 the subject matter of this application, I have no alternative but to dismiss the application with no order as to costs.

Application dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar